BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking R.08-08-009

REPLY COMMENTS OF THE GREEN POWER INSTITUTE ON ASSIGNED COMMISSIONER'S RULING

March 6, 2009

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Pursuant to the February 3, 2009, *Assigned Commissioner's Ruling Regarding Potential Renewables Portfolio Standard Development in Imperial Valley and Evaluation of Renewable Procurement Contracts*, as modified by the February 9, 2009, *Administrative Law Judge's Ruling Extending Time for Comments and Reply Comments*, the Green Power Institute (GPI) hereby submits these *Reply Comments of the Green Power Institute on Assigned Commissioner's Ruling*, in Proceeding R-08-08-009, **Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program**.

We wish to address two issues in these *Reply Comments*: the use of seller non-performance as an excuse for LSE failure to meet annual RPS procurement obligations, and the relationship between seller non-performance and the RPS program's Flexible Compliance system. According to our understanding of the RPS program, Flexible Compliance is a system of rules that allow LSEs to bank surplus renewables procurement indefinitely into the future, and to makeup current-year procurement deficiencies by applying backwards surplus or earmarked procurement for the three years following which a procurement deficit was incurred. In all cases, compliance with RPS obligations is measured in units of renewable energy procured, not energy contracted for.

In a related set of rules relating to LSE procurement deficits that remain after all possible Flexible Compliance mechanisms are applied, one of the excuses that an LSE may present to the Commission to try to avoid a prescribed penalty is seller non-performance. Using this excuse the LSEs would argue, in effect, that they contracted for sufficient capacity to meet their obligations, but the suppliers they contracted with did not deliver.

Many of the parties to this proceeding, both in their *Comments on the ACR*, and at the recent (February 17) workshop, are now using the term Flexible Compliance to refer to the use of seller non-performance as an excuse for non compliance with an RPS obligation. For example, PG&E, on page 6 of their *Comments*, state: "The Commission should not impose additional restrictions on whether Commission-approved PPAs may be counted for flexible compliance by tying flexible compliance to project viability." Commission-approved PPAs cannot be counted for Flexible Compliance, only generated and delivered energy can be used for Flexible Compliance. Unfulfilled contracts can be used in efforts to use seller non-performance as an excuse for non compliance with an annual-procurement obligation, but that is only appropriate post the application of Flexible Compliance mechanisms. We believe that it is inappropriate terminology to conflate Flexible Compliance and seller non-performance. Doing so has the effect of confusing different subsections of the RPS program rules, and implies that the statutorily-based Flexible Compliance rules allow LSEs to comply with their RPS obligations on the basis of energy contracts, rather than actual deliveries. This is absolutely not the case, and should not be allowed to become the case in the future.

PG&E takes the confusion between Flexible Compliance and seller non-performance a step further when it states, later on page 6 of their *Comments*: "A finding that a project is sufficiently viable for Commission approval of the PPA should automatically mean it is reasonable for the IOU to rely on future deliveries from the project." This statement is simply not true. Commission approval of a PPA is in no way an endorsement by the Commission that the purchasing LSE should be able to **rely** on future deliveries from the project. Indeed, it is well known that not all power purchase contracts result in operating projects. Many project-development hurdles remain after the signing of a PPA. History suggests that a 30 percent project-failure rate should be expected on a portfolio basis (see, for example, Kema, Inc., *Building a "Margin of Safety" in Renewable Energy Procurements: A Review of Experience with Contract Failure*, consultant report to CEC, report no. CEC-300-2006-004, January, 2006). Prudent utility procurement planning requires that this expected failure rate be taken into account by the utility, which can be

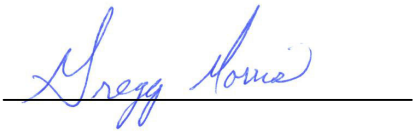
accomplished, for example, by over-contracting for its expected energy needs by roughly thirty percent.

The fact that the Commission has approved a particular PPA does not automatically mean that the PPA can be used in its entirety as proof of seller non-performance for purposes of justifying under-procurement of renewables, in the event the project fails to achieve full operational status on a timely basis. In the discussion on this subject on page 5 in Attachment A to the ACR, the text states: "If an IOU uses seller non-performance as an excuse, however, that IOU must also show that it took all reasonable actions to meet its RPS obligations." All reasonable actions, in the opinion of the GPI, means a sufficient level of over-contracting to account for the expected rate of project-development failures. No individual contracts for projects in development can or should ever be **relied** on to achieve operational status. Even Commission-approved utility projects have been known to fail.

PG&E takes its desire to rely on signed contracts to its logical conclusion on page 17 of their *Comments*, when they assert: "Having to guarantee seller performance may require IOUs to seek seller indemnification for penalties associated with non-delivery." Again, the only indemnification they need is their own wise procurement practices, based on an appropriate level of over-contracting to ensure that sufficient operating capacity ultimately is brought online to provide them with their procurement needs. Requiring seller indemnification would only serve to non-productively increase the cost of renewable electricity, and make the state's RPS goals less likely to be achieved.

In conclusion, we ask the Commission to distinguish carefully between the RPS Flexible Compliance rules, and the use of claims of seller non-performance in efforts to excuse penalties for under-procurement of renewable electricity after Flexible Compliance mechanisms are exhausted. Seller non-performance should only work as a legitimate excuse if the utility can demonstrate that it made sufficient efforts to over-contract for new energy in order to be able to obtain the amount they need on a portfolio-wide expected-delivery basis.

Dated March 6, 2009, at Berkeley, California.
Respectfully Submitted,



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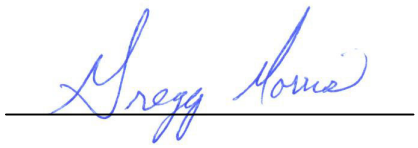
VERIFICATION

I, Gregory Morris, am Director of the Green Power Institute, and a Research Affiliate of the Pacific Institute for Studies in Development, Environment, and Security. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Reply Comments of the Green Power Institute on Assigned Commissioner's Ruling*, filed in R.08-08-009, are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

Executed on March 6, 2009, at Berkeley, California.



Gregory Morris

PROOF OF SERVICE

I hereby certify that on March 6, 2009, in Berkeley, CA, I have served a copy of REPLY COMMENTS OF THE GREEN POWER INSTITUTE ON ASSIGNED COMMISSIONER'S RULING, upon all parties listed on the Service List for this proceeding, R-08-08-009. All parties have been served by email or first class mail, in accordance with Commission Rules.

Gregory Morris